

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

FRIENDS OF CORAL BAY, ELEANOR)	
GIBNEY, DAVID GROVE, and RICHARD)	
SULLIVAN,)	
)	Civil No. 2007-20
Plaintiffs,)	
)	
v.)	
)	
)	
RELIANCE HOUSING FOUNDATION, INC,)	
and RELIANCE-CALABASH BOOM)	
ASSOCIATES, LLP)	
Defendants.)	
)	
)	

Attorneys:

Alan Smith, Esq.
St. Thomas, U.S.V.I.
For the plaintiffs,

Treston Moore, Esq.
St. Thomas, U.S.V.I.
For the defendants.

MEMORANDUM OPINION

Before the Court is the application of plaintiffs, Friends of Coral Bay, Eleanor Gibney, David Grove, and Richard Sullivan (collectively, the "Friends") for a temporary restraining order against the defendants Reliance Housing Foundation, Inc. and Reliance-Calabash Boom Associates, LLP (collectively, "Reliance").

FACTS

Coral Bay is a large body of water located at the east end of St. John. It is composed of a number of smaller bays, including Johnson Bay. Reliance plans to build a housing community in Calabash Boom, near Johnson Bay (the "Project").

On February 28, 2006, the Chairman of the St. John Coastal Zone Management Committee signed a permit for the Project (the "CZM Permit"). The CZM Permit approved "the development and construction of a new residential community that [will] consist of... seventy-two (72) [housing] units total for low to medium income families on St. John, Virgin Islands." (Mot. for TRO, Ex. 2). The CZM Permit also authorizes a waste water treatment plant and a reverse osmosis plant (the "RO Plant"). The RO Plant design requires a brine discharge line (the "Discharge Line") that would release a saline discharge into Coral Bay.¹

On January 2, 2007, without receiving any additional permits from any territorial or federal agency, Reliance commenced work on the Project by moving soil, preparing roads and installing runoff mitigation measures. On January 11, 2007, the Friends initiated this action, seeking to enjoin work on the Project for

¹ Reliance argues that the RO Plant is "no longer envisioned" (Supp. Opp., 17), but it has not produced any competent evidence to support this claim.

several reasons. First, the Friends allege that the Project will generate light and water pollution that will adversely affect endangered and threatened species, including sea turtles, which live in Coral Bay. The Friends also allege that Reliance is violating the Virgin Islands Coastal Zone Management Act (the "CZM Act") by failing to obtain the appropriate permits required prior to initiating development. See V.I. CODE ANN. tit. 12, § 910(g). Finally, the Friends allege that Reliance is violating the Virgin Islands Clean Water Act (the "CWA" or the "Act") by beginning construction on a project that will increase the discharge of water pollutants into Coral Bay without obtaining permits for that work. V.I. Code Ann. tit. 12, § 185(b) (the "CWA permits"). On January 17, 2007, the Friends filed a motion for a temporary restraining order, and notified Reliance of its filing. The Court took evidence from both parties in a hearing on January 19, 2007.

DISCUSSION

"The standards for a temporary restraining order are the same as those for a preliminary injunction." *Bieros v. Nicola*, 857 F. Supp. 445, 446 (E.D.Pa. 1994). The Friends must demonstrate "1) a likelihood of success on the merits, 2) the probability of irreparable harm if the relief is not granted, 3) that granting injunctive relief will not result in even greater

harm to the other party and 4) that granting relief will be in the public interest." *Id.* (citing *Frank's GMC Truck Ctr., Inc. V. G.M.C.*, 847 F2d 100, 102 (3d Cir. 1988)).

ANALYSIS

The Court will first address the alleged CWA violation.

A. Likelihood of Success on the Merits

The Friends allege that Reliance has begun construction in violation of the CWA. To succeed on this claim, the Friends must show: (1) that Reliance has engaged in an activity restricted by the Act, and (2) that Reliance failed to get a permit that would allow the restricted activity. See V.I. CODE ANN., tit. 12, § 183 (2006).

The CWA requires a permit for "the construction, installation or operation of any individual, commercial or other establishment... the operation of which would cause an increase in the discharge of pollutants into the waters of the United States Virgin Islands or would otherwise alter the physical, chemical or biological properties of any waters of the United States Virgin Islands in any manner not already lawfully authorized." V.I. CODE ANN. tit. 12, § 183(b)(3)(2006). The Act defines the term "pollutant" to include "industrial, municipal and agricultural waste discharged into water." *Id.* at § 182 (b).

It also defines "discharge" as "the addition of any pollutant to United States Virgin Islands waters from any point source." *Id.* at § 182 (j).

The Project's Discharge Line is a pipe, which brings high saline waste, also called brine, from the RO Plant directly to Coral Bay. Accordingly, it's "construction, installation [and] operation" are restricted activities under the Act. Reliance argues that moving soil, clearing roads, and installing runoff mitigation are "pre-construction" and not "construction." The Court is unaware of any such distinction contemplated by the CWA that would allow commencement of a project, the completion of which includes undertaking otherwise proscribed activity, absent a permit.²

The Friends have also asserted, without contradiction, that Reliance failed to obtain a CWA permit from the Commissioner of the Virgin Islands Department of Planning and Natural Resources. See V.I. ANN. CODE tit. 12, § 185 (2006). Accordingly, the Friends have demonstrated a likelihood of success on the merits on the CWA claim.

² Moreover, the statute also restricts "installation," which is commonly understood as "connect[ing] or set[ing] in position and prepar[ing] for use." AMERICAN HERITAGE DICTIONARY, 4th Ed., 2000.

B. Irreparable Harm

To obtain injunctive relief, the Friends also "must demonstrate a potential harm which cannot be redressed by legal or equitable remedy following trial [so that injunctive relief] is the only way of protecting the movant from harm." *Caplan v. Fellheimer Eichen Braveman & Kaskey*, 68 F.3d 828, 839 (3d. Cir. 1995).

The Friends have presented evidence that because the "[b]rine [is] denser than regular seawater, [it] will tend to sink to the bottom at ambient temperature and create a plume of hypersaline water" at the point of release. See Oct. 3, 2005, Letter from U.S. Fish & Wildlife Serv., Mot. for TRO, Ex. 6. Additionally, Dr. Barry Devine testified that:

"[The plume] will change the salinity of the bay from... 30 or 35 parts per thousand, to upwards of a hundred parts per thousand, depending on how the brine moves around.... [and high levels of salinity] will eventually drive off and kill most of the supporting organisms in the ecosystem [like] seagrass, coral, fish, turtles [and] a whole host of invertebrates..."

(TRO Hr'g Tr. 79-80, Jan. 19, 2007).

The evidence does not precisely define the rise in salinity levels that the plume will cause in Coral Bay. However, the Friends have produced evidence that shows a change of "one to five parts per thousand will ultimately and chronically kill" many organisms in Coral Bay. (Devine Test., TRO Hr'g Tr. 92).

Given the significant amount of brine discharge anticipated from the Project, the Friends have made a prima facie showing that the Project will cause environmental damage that would be beyond legal remedy.

Accordingly, the Friends have satisfied the requirement for irreparable injury.

C. Balance of Hardships

In determining whether injunctive relief is appropriate, the Court must also balance the hardships at issue. Reliance alleges that if work on the project is enjoined, they will incur minimal monthly losses of \$ 1,630,818, and jeopardize their tax credits for the project, which amount to more than \$30,000,000.

Potential economic harm is relevant when balancing the hardships. *Baker Elec. Co-op, Inc., v. Chaske*, 28 F.3d 1466 (8th Cir. 1994). However, Reliance cannot establish a legitimate hardship by citing economic harms caused by enjoining its illegal activity. *See Unisource Worldwide, Inc. v. S. Sent. Al. Supply LLC*, 199 F. Supp. 2d 1194, 1214 (M.D. Ala. 2001). Because the Friends have shown a substantial likelihood that Reliance is violating the CWA, the Court finds the balance of hardships favors a temporary injunction.

D. Public Interest

Finally, in considering the TRO application, the Court must consider the public interest in granting a TRO. Both parties allege that the public interest is best served by a ruling in their favor. The Friends cite the public interest in preventing destruction to the environment, while Reliance cites the public interest in creating affordable housing. The Virgin Islands Legislature has made declarations on each of these areas.

Upon enacting the CWA, the Virgin Islands Legislature declared that it is "the public policy of the United States Virgin Islands... to protect, maintain and improve the quality [of Virgin Islands water] for public water supplies, for the propagation of wildlife, fish and aquatic life, and for domestic, recreational and other legitimate beneficial uses." V.I. CODE. ANN., tit. 12, § 181 (2006).

The Virgin Islands Legislature has also declared that: "it is in the public interest, and essential to the public necessity and welfare, in order to encourage home ownership and provide decent housing for persons of moderate income, that there be undertaken [programs] of home ownership and development...." V.I. Code Ann., tit. 29, § 191(a)(5)(2006).

Reliance suggests that the interests in offering affordable housing and protecting the environment are in conflict. The

Court is not persuaded by Reliance's suggestion. Indeed, these two interests are entirely capable of co-existing. It is reasonable to conclude that the public interest would be served by constructing affordable housing in a manner that preserves the environment.³

Accordingly, the Court finds that the public interest favors granting the temporary restraining order.

CONCLUSION

The Court will grant the motion for a temporary restraining order.⁴ An appropriate order follows.

Dated: January 26, 2006

Curtis V. Gómez
Chief Judge

ATTEST:

WILFREDO F. MORALES
Clerk of the Court

By: _____

³ To accept Reliance's contrary suggestion, this Court would have to accept that development without required permits is justified as long as a contractor cites some public interest that is served, even as other public interests are harmed. The Court cannot accept such an "ends justify the means" approach.

⁴ Because the Friends can receive all the relief available at the temporary injunction stage on this basis alone, the Court declines to address the other two claims. See *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982) ("One of the inherent characteristics of a temporary restraining order is that it has the effect of merely preserving the status quo rather than granting most or all of the substantive relief requested in the complaint.")

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